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1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEW JERSEY  
3 CIVIL ACTION CASE NO. 2:08-CV-1567  
4 DR. FADI CHABRAN; DR. SABINO R. TORRE, DR.  
5 CONSTANTINOS A. COSTEAS and DR. ANTHONY J.  
6 CASELLA, as Trustee of Diagnostic & Clinical:  
7 Cardiology, P.A. Profit Sharing Plan,  
8 Plaintiffs,  
9 vs.  
10 DR. MARIO A. CRISCITO,  
11 Defendant.  
12 Wednesday, July 15, 2009  
13 Deposition of BRIAN WARNOCK, VOLUME II,  
14 before Nancy A. Miani, a Certified Court Reporter,  
15 License No. XI00814, and a Notary Public of the State  
16 of New Jersey at the offices of WITMAN, STADTMAUER,  
17 ESQS, 26 Columbia Turnpike, Florham Park, New Jersey,  
18 on Wednesday, July 15, 2009, at 10:10 a.m.  
19  
20  
21 MIAMI COURT REPORTING  
22 CERTIFIED COURT REPORTERS  
23 1741 DANIEL COURT  
24 WALL, NJ 07719  
25 (732) 681-4776

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## I APPEARANCES:

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14  
15 ALSO PRESENT:  
16 Anthony Casella, M.D.  
17  
18  
19  
20  
21  
22  
23  
24  
25

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## EXHIBITS

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<p>191</p> <p>1 <u>LITIGATION SUPPORT</u></p> <p>2</p> <p>3 DIRECTION NOT TO ANSWER</p> <p>4 (None)</p> <p>5</p> <p>6 MOTION TO STRIKE</p> <p>7 (None)</p> <p>8</p> <p>9 DOCUMENT REQUEST</p> <p>10 207-21 278-12 361-22</p> <p>11 236-22 279-7 362-8</p> <p>12 262-9 284-18 369-4</p> <p>13 270-13 293-2</p> <p>14 271-15 359-3</p> <p>15</p> <p>16 EXHIBIT ANALYSIS</p> <p>17 Original Exhibits Warnock 22 through</p> <p>18 Warnock-33 are attached to Original</p> <p>19 Transcript.</p> <p>20</p> <p>21 Copies of exhibits attached to transcripts.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>193</p> <p>1 We don't always necessarily get a signed copy.</p> <p>2 Q. How would you get a signed copy?</p> <p>3 A. We ask them to send us a signed copy just</p> <p>4 so we have it in our file as evidence that it was</p> <p>5 done, but some people send it back, some people don't.</p> <p>6 Q. If we go to Page 259 -- no number on this</p> <p>7 one. The fifth page, one, two, three, four -- fifth</p> <p>8 page.</p> <p>9 A. 25959.</p> <p>10 MR. KERN: Is there a stamp on this one?</p> <p>11 MR. CHARME: I don't see it.</p> <p>12 Q. It's the fifth page of what's been marked</p> <p>13 Warnock-8. It doesn't have a Bate stamp on it.</p> <p>14 A. All right.</p> <p>15 Q. Is it your testimony that this form would</p> <p>16 have gone to Dr. Criscito unsigned, and he would have</p> <p>17 returned it to you with a signature, a copy to you</p> <p>18 with a signature?</p> <p>19 A. He would send us one page. We send him</p> <p>20 the forms to sign, send the whole package into the</p> <p>21 IRS, and then we send one page, one blank first page</p> <p>22 for him to sign and send back to us, and that way we</p> <p>23 have it in the file, and it's really for if the IRS</p> <p>24 ever asks, A, we didn't get the form or whatever, we</p> <p>25 got it late, we can say no, he filed it on this day,</p>
<p>192</p> <p>1 BRIAN WARNOCK,</p> <p>2 American Pension Corporation, 1375 Plainfield Avenue,</p> <p>3 Watchung, New Jersey, resworn.</p> <p>4 CONTINUED CROSS EXAMINATION BY MR. KERN:</p> <p>5 Q. I want to begin by turning to what's been</p> <p>6 previously marked Warnock-8.</p> <p>7 A. Okay.</p> <p>8 Q. Can I start? Okay. Now, is this a copy</p> <p>9 of the 5500 that was in your file?</p> <p>10 A. Yes. Yes.</p> <p>11 Q. I note that on the third page of this</p> <p>12 exhibit, marked 25958, there is no signature of the</p> <p>13 employer or plan sponsor. Do you know why that is?</p> <p>14 A. No, I don't.</p> <p>15 Q. And who was the plan sponsor?</p> <p>16 A. Well, the employer would be, so an</p> <p>17 officer of Diagnostic would sign.</p> <p>18 Q. I also note on the first page of the</p> <p>19 document that there is no signature of either the plan</p> <p>20 administrator or of the employer, plan sponsor, right?</p> <p>21 A. That is correct.</p> <p>22 Q. That was 25946. Would this have gone out</p> <p>23 to the IRS in this form?</p> <p>24 A. No. We send the forms to Dr. Criscito or</p> <p>25 to the employer. He signs it, sends it into the IRS.</p>	<p>194</p> <p>1 and he even sent us a copy saying -- with the same</p> <p>2 date. That's the reason we ask for it.</p> <p>3 Q. You see the signatures on the bottom of</p> <p>4 this page?</p> <p>5 A. Yes, I do.</p> <p>6 Q. Do they appear to be two different</p> <p>7 signatures, the signature of the second individual?</p> <p>8 A. I would think they were the same.</p> <p>9 Q. They don't look different to you?</p> <p>10 MR. CHARME: Asked and answered.</p> <p>11 Objection.</p> <p>12 Q. They don't look different to you?</p> <p>13 A. One has an A in it and one doesn't.</p> <p>14 Q. Let's go down two more pages. This is</p> <p>15 another page which is not Bate stamped, but on the</p> <p>16 bottom page it says October 19th, 2004. Do you have</p> <p>17 that one? Again, two signatures?</p> <p>18 A. Yes.</p> <p>19 Q. Do they appear to be the same signature</p> <p>20 of the same person?</p> <p>21 A. They do look somewhat different, somewhat</p> <p>22 the same.</p> <p>23 Q. Do you have any explanation for it?</p> <p>24 A. No idea.</p> <p>25 Q. Okay. Let's go then to Warnock-9.</p>

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1 A. Okay.

2 Q. This is a report that you believe you  
3 received from Dr. Criscito in 1998?

4 A. Yes.

5 Q. And it indicates that there are monies in  
6 this commingled account in a number of different  
7 repositories, correct?

8 A. Correct.

9 Q. Was there ever a time when there was a  
10 determination that monies, for example, in Dean Witter  
11 belonged to certain participants, and monies that  
12 belonged in Schwab belonged to other participants, or  
13 was this, for your purposes, treated as one pool of  
14 money?

15 MR. CHARME: I object to the form.

16 A. It was one pool of money.

17 Q. All right. And did that hold true during  
18 the entire period that you were involved in this  
19 account?

20 MR. CHARME: Same objection to the form.

21 A. It would hold true for the commingled  
22 account, yes. We did get a separate report, for  
23 example, for Dr. Casella, completely --

24 Q. I'm just talking about the commingled  
25 account.

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1 A. Right.

2 Q. So whether the money was in Dean Witter,  
3 in Schwab, in Smith Barney, in Morgan Stanley, your  
4 only concern was the totality of the money, and it  
5 wasn't as though one participant's money was part of  
6 the Dean Witter account, and another person's money  
7 was part of the Schwab account, the third  
8 participant's money was part of the Morgan Stanley  
9 account, right?

10 MR. CHARME: Objection to form.

11 A. That is correct, it was all just one big  
12 pot.

13 Q. So when it came time to determining a  
14 distribution number, or how much money was -- when it  
15 came time to distributing money out of the commingled  
16 account, it was the total pool of money that was at  
17 issue, correct?

18 A. Correct.

19 Q. And in determining how much money was  
20 still in the commingled account for an individual,  
21 that was also based upon the totality of money in all  
22 of the accounts, correct?

23 MR. CHARME: I object to the form.

24 A. I'm not sure of the question.

25 Q. If somebody didn't take a distribution,

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1 that was still money for that person in the account?

2 A. If no one took a distribution, yes.

3 Q. Speaking of that, was there anything in  
4 the plan documents which precluded somebody from  
5 participating both in a segregated account and in a  
6 commingled account?

7 A. No.

8 Q. They could have money in both?

9 A. Could be.

10 Q. All right. Let's go to the next page.

11 Do you know when this was received by APC?

12 A. I don't know exactly, but it would have  
13 been part of the 2000 report. So it would have been  
14 received sometime in 2001.

15 Q. Do you know who crossed out '99 and put  
16 in 2000?

17 A. That's my cross out, yes.

18 Q. That's your handwriting?

19 A. Yes.

20 Q. Do you know who prepared this document?

21 A. This would have come from Dr. Criscito.

22 Q. Do you know how it was received?

23 A. Could have been mailed, could have been  
24 faxed. Either one.

25 Q. Was there a cover page that came with it?

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1 A. Looking at that one page, I don't know.

2 Q. So how would you know it came from Dr.  
3 Criscito?

4 A. Because that's the information that he  
5 would send us, we would use that format. If I went  
6 back in the files, and -- probably, not necessarily,  
7 but I might find the cover page with it.

8 Q. Well, this wasn't the format that he used  
9 in 1999, correct?

10 A. He did -- I'd have to look at the '99  
11 file.

12 Q. Warnock-10.

13 A. Warnock-10. No. It's not exactly the  
14 same.

15 Q. And there's no fax stamp on this,  
16 correct?

17 A. 25870 there is not. There is one on  
18 25957. And on 25997.

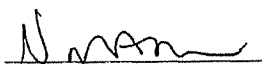
19 Q. You say there's a fax on 25957?

20 A. No. 25957 there is a fax stamp on the  
21 bottom.

22 Q. Not on my copy. Okay. And 997?

23 A. 997 there is also a fax stamp with Mario  
24 Criscito.

25 Q. But none on 25870?

<p style="text-align: right;">383</p> <p>1 Q. Finally, you previously testified that an</p> <p>2 active participant could maintain monies in both the</p> <p>3 commingled account and in the segregated account,</p> <p>4 correct?</p> <p>A. It would be legal to do it, yes.</p> <p>6 Q. Nothing which would have precluded that,</p> <p>7 correct?</p> <p>8 A. There's nothing to preclude that no.</p> <p>9 MR. KERN: I have nothing further.</p> <p>10 A. It would be unusual, but there's nothing</p> <p>11 to preclude it, no.</p> <p>12 MR. KERN: I have nothing further. Thank</p> <p>13 you.</p> <p>14 MR. CHARME: I have one quick question.</p> <p>15 REDIRECT EXAMINATION BY MR. CHARME:</p> <p>16 Q. Do you know if, in the case of</p> <p>17 Diagnostic, anyone maintained both money in a</p> <p>18 commingled account and in a segregated account?</p> <p>19 A. No, no one did.</p> <p>20 RECROSS EXAMINATION BY MR. KERN:</p> <p>21 Q. Well, how do you know that? If there</p> <p>22 were monies sitting in the Smith Barney account that</p> <p>23 hadn't been distributed for whatever reason, and those</p> <p>24 monies belonged to active participants, then the fact</p> <p>25 is that there would have been monies maintained in</p>	<p style="text-align: right;">385</p> <p>1 Criscito maintained an individual segregated account</p> <p>2 at Smith Barney?</p> <p>3 A. For himself?</p> <p>4 Q. For himself.</p> <p>5 A. No.</p> <p>6 MR. CHARME: No further questions.</p> <p>7 MR. KERN: No further questions.</p> <p>8 (At 4:40 p.m., the deposition is</p> <p>9 adjourned.)</p>
<p style="text-align: right;">384</p> <p>1 both the commingled account and a segregated account</p> <p>2 for that individual, right?</p> <p>3 A. That is correct. But no one</p> <p>4 intentionally was in both accounts.</p> <p>5 Q. As far as you know?</p> <p>6 A. As far as I know, for sure, no one was</p> <p>7 intentionally in the commingled account and the</p> <p>8 segregated account because nobody said keep half of my</p> <p>9 money in the commingled account, put half of my money</p> <p>10 in a separate account.</p> <p>11 Q. I understand. That commingled account</p> <p>12 was maintained at least through 1995 -- at least</p> <p>13 through 2005, correct?</p> <p>14 A. Yes, it was a small balance left in the</p> <p>15 2005.</p> <p>16 Q. You don't know how much was in the Smith</p> <p>17 Barney account in 2005, though, do you?</p> <p>18 A. No. What we had, it was just --</p> <p>19 Q. Do you know what the name on the Smith</p>	<p style="text-align: right;">386</p> <p style="text-align: center;"><u>CERTIFICATION</u></p> <p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5 I, NANCY A. MIANI, a Certified Court Reporter</p> <p>6 and a Notary Public, License No. XI00814, do hereby</p> <p>7 certify that the foregoing witness, ^, was duly sworn</p> <p>8 by me on the date indicated, and that the foregoing is</p> <p>9 a true and accurate transcription of my stenographic</p> <p>10 notes.</p> <p>11 I further certify that I am not employed by</p> <p>12 nor related to any party to this action.</p> <p>13</p> <p>14</p> <p>15</p> <p>16 </p> <p>17 NANCY A. MIANI, C.S.R.</p> <p>18 LICENSE NO. XI00814</p> <p>19</p>
<p>20 Barney account is until this very day?</p> <p>A. No.</p> <p>22 MR. KERN: I have nothing further.</p> <p>23 MR. CHARME: I have one quick question.</p> <p>24 REDIRECT EXAMINATION BY MR. CHARME:</p> <p>25 Q. Did anyone ever say to you that Dr.</p>	<p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>